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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

IN RE: PATRICK MCKENZIE,

Petitioner,

EXTRAORDINARY WRIT OF HABEAS CORPUS

PATRICK MCKENZIE
FCC-Coleman (LOW)
P.O. Box 879
Coleman, FL *3352* 1-0879

PETITIONER.

45pp

QUESTIONS PRESENTED

1. Whether petitioner's enhanced sentence of 262 months in excess of statutory maximum under drug count, where drug quantity and role in offence were not charged in the indictment and proven beyond reasonable doubt, but, rather determined by sentencing judge by a preponderance of evidence, must be vacated in light of *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000)'?

2. Whether barring petitioner's *Apprendi* claims from judicial review raises serious constitutional questions and offends the U.S. Constitution by allowing a person to stand convicted of an offense illegally obtained and serve an unlawful sentence for same as a result of a new rule of constitutional law?

3. Whether the new rule of law established under *Apprendi v. New Jersey,* 120 S.Ct.2348 (2000) is to be applied retroactively during collateral review?

4. Whether McKenzie's conviction is due to be vacated because the statutes under which he was convicted, 21 U.S.C. §§§§ 841(a), 846, 952, 960, and 963, are unconstitutional as a result of the decision of the United States Supreme Court in *Apprendi v. New Jersey*, 503 U.S. ___, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), and his conviction thereunder abrogates his rights under the Fifth Amendment to due process of law and under the Sixth Amendment to notice and a jury trial?

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ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Patrick McKenzie (Mr. McKenzie) respectfully prays for a writ of habeas corpus on the grounds that his conviction was illegally obtained and sentence was unlawfully imposed in light of the recent decision by the Court in *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000) which established a new rule of constitutional law. Mr. McKenzie has no other means or avenue to obtain judicial relief and vacatur of his conviction and sentence in the district where he was convicted or is imprisoned.

OPINIONS BELOW

The unpublished order of the Seventh Circuit Court of Appeals denying Mr. McKenzie's Application for leave to file a second or successive section 2255 petition in light of *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000) is reproduced in the Appendix hereto A(1). The decision of the Seventh Circuit Court of Appeals in *United States v. McKenzie,* is published at 922 F.2d 1323 (7th Cir. 1991).

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §§ 1651(a) and 2241. Mr. McKenzie's petition seeks to vacate his illegal and unlawful conviction and sentence in light of the recent decision by the Court in *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000) and new rule of constitutional law established therein. Petitioner further submits: 1) that the granting of the instant habeas petition will be in aid of the Court's appellate jurisdiction since there is a definitive split among the federal courts on the question presented herein; 2) there are exceptional circumstances warranting the exercise of the Court's discretionary powers; and 3) that adequate relief cannot be obtained in any other form or from any other court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 28 U.S.C. §§ 2241, 2255 and the Fifth and Sixth Amendments to the United States Constitution are set forth in Appendix B, C, D, E and F.

STATEMENT OF CASE

A. PROCEDURAL HISTORY

In 1988, a federal grand jury for the Northern District of Illinois indicted PATRICK MCKENZIE (Mr. McKenzie) and his confederates for violation of Title 21 U.S.C. §§§§§ 841(a)(1), 846, 952(a), 960(a)(1) and 963. The indictment failed to charge all of the alleged quantity of drugs involved in the offense as well as those offense elements proscribed under Title 21 U.S.C. § 841(b)(1). The indictment also did not charge Mr. McKenzie' s role in the offense, *i.e.,* organizer, leader, or manager. *See United States v. McKenzie,* 922 F.2d 1323, 1326-28 (7th Cir. 1991).

In 1989, Petitioner, along with his co-defendants, were found guilty on all counts by the jury. Thereafter, the district court sentenced Mr. McKenzie to a term of 262 months imprisonment and ten (10) years supervised release.

In 1991, the Seventh Circuit Court of Appeals affirmed Mr. McKenzie' s conviction and sentence by a published opinion. *McKenzie,* 922 F.2d 1323 (7th Cir. 1991).

In 1992, the district court granted in part Mr. McKenzie's section 2255 petition and reduced his term of supervised release from ten (10) years to three (3) years.

On September 11, 2000, the Seventh Circuit entered an order denying Mr. McKenzie's request for leave to file a second or successive section 2255 petition based on the court's decision in *Apprendi*, citing that the *Apprendi* decision was not expressly made retroactive by the Court. *(See* Appendix A).

The instant petition followed since: 1) Mr. McKenzie cannot seek a petition for writ of certiorari review and reversal of the order entered by the Seventh Circuit denying the request for permission to file a second or successive section 2255 petition; 2) the district of Mr. McKenzie's confinement precludes habeas relief under 28 U.S.C.§ 2241, *see Wofford v. Scott,* 177 F.3d 1236 (11th Cir. 1999); 3) that adequate relief cannot be obtained in any other form or from any other court; Mr. McKenzie has no other means or avenue to have his habeas claims presented herein judicially reviewed; and 4) there are exceptional circumstances warranting the exercise of the Court's

discretionary powers, *i.e.*, vacating an illegal and unlawful conviction and sentence.

Mr. McKenzie is presently serving his sentence at FCC Coleman (LOW), Coleman, Florida and the custodian is Warden R. D. Swope.

B. FACTS

In 1989, a trial by jury was held whereat Mr. McKenzie's trial attorney requested that the jury be allowed to decide the type and quantity of drugs involved in the offense as well as attributed to Mr. McKenzie. The district court denied Mr. McKenzie's request for a special jury verdict heretofore described. The jury later convicted Mr. McKenzie on all counts of the Indictment.

At sentencing, Mr. McKenzie timely objected to the court's determination of the drug quantities and type, proffering as he did at trial, that drug type and quantities are offense elements which must be decided by a jury and proven beyond a reasonable doubt. The district court overruled Mr. McKenzie's objection and determined that Mr. McKenzie must be sentenced to 262 months imprisonment based on the quantity of drugs involved and

Mr. McKenzie's role in the offense. The court also imposed a ten (10) year period of supervised release. *See United States v. McKenzie,* 922 F.2d 1323, 1326(7th Cir. 1991).

On appeal, Mr. McKenzie raised several points of error, one of which was the district court's denial of a special jury verdict described above. *McKenzie,* at 1327-28. The Seventh Circuit held:

> "A special verdict was not needed. First, the sixth amendment requires that a jury determine only questions of guilt or innocence; **punishment is the province of the court** . . . In criminal cases to which the Sentencing Guidelines apply, the trial judge must resolve 'a myriad of factual issues that bear on the calculation of the relevant offense level and criminal history category,' **including quantity of drugs involved in the offense.**"

McKenzie, at 1327-28. The Seventh Circuit also held that "McKenzie's role in the conspiracy is a fact question for the sentencing court to resolve . . ." *McKenzie,* at 1330-31.

On June 26, 2000, the Court decided *Apprendi v. New Jersey,* 120 S.Ct. 2348 (June 26, 2000) which established a new rule of constitutional law: "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 120 S.Ct. at 2362-63.

In August 2000, Mr. McKenzie filed his application for leave to file a second or successive section 2255 petition in the Seventh Circuit Court of Appeals, in light of the new rule of constitutional law announced in *Apprendi, supra. McKenzie v. United States*, No. 00-3195 (7th Cir. 2000)(unpublished) (Appendix A).

On September 11, 2000, the Seventh Circuit entered an order denying Mr. McKenzie's application described above. *(See* Appendix A). The Seventh Circuit held that "The Supreme Court, however, has not specifically declared *Apprendi* retroactive to cases on collateral review." *id. (citing Bennett v. United States,* 119 F.3d 470, 471 (7th Cir. 1997)).

Mr. McKenzie now files this, his EXTRAORDINARY WRIT OF HABEAS CORPUS pursuant to Title 28 U.S.C. §§ 1651(a) and 2241, seeking to have his illegal and unlawful conviction and sentence vacated in light of the new rule of constitutional law established in *Apprendi, supra.*

REASONS FOR GRANTING THE PETITION

The Court should grant the writ of habeas corpus because the questions raised by the case *sub judice* involve: 1) serious constitutional questions; 2) a conflict among the federal courts; 3) exceptional circumstances warranting the exercise of the Court's discretionary powers; and 4) that adequate relief cannot be obtained in any other form or from any other court.

There is a compelling reason for this Court to reach the merits of the habeas petition here. "Not one of the *Apprendi-based* applications for permission to file [a second or successive section 2255 petition] has been granted, however, and none is going to be granted in the future, for a fundamental reason: a new decision of the Supreme Court justifies a second or successive collateral

attack only if it establishes 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" *Talbott v. State of Indiana,* 2000 WL 1268166 (7th Cir.)(Sept. *7,* 2000).

The Seventh Circuit not only rejected but strongly criticized the Third Circuit's decision in *West v. Vaughn,* 204 F.3d 53, *59-63* (3rd Cir. 2000), which held "that a decision of the Supreme Court is 'retroactive to cases on collateral review' if its logic implies retroactivity under the approach of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 344 (1989). *Talbott,* 2000 WL 1268166 (7th Cir.).

Further, the Seventh Circuit held that until the Court expressly makes *Apprendi* retroactive, "prisoners should hold their horses and stop wasting everyone's time with futile applications." *Id.* Without the Court resolving the split among the circuit courts as well as addressing the habeas issues presented herein, *i.e.,* retroactivity of *Apprendi,* courts will be continually "peppered" with initial collateral attacks and applications for permission to file

successive section 2255 petitions - a flood of which, as predicted by Justice O'Connor in her dissenting opinion in *Apprendi,* has already hit the federal district and circuit courts. For the foregoing events and decisions following *Apprendi,* Petitioner strongly urges the Court to reach the merits of the habeas petition - a matter of extreme importance to every federal and state jurist in the country. This Court has stated that "[a]t stake in this case are constitutional protections of unsurpassing importance...." *Apprendi*, 120 S.Ct. At 2355.

Mr. McKenzie's sentence was increased beyond the statutory maximum of 20 years imprisonment based on facts not alleged in the indictment, or decided by a jury and proven beyond a reasonable doubt - a clear *Apprendi* claim. In other terms, he received an unlawful and illegal sentence, all in violation of his rights secured to him under the U.S. Constitution. However, Mr. McKenzie is incarcerated in a federal prison within the Eleventh Circuit - a circuit which precludes him from obtaining habeas relief on his *Apprendi* claim. *See Wofford v. Scott,* 177 F.3d 1236, 1243 (11th Cir. 1999).

In the case *sub judice,* the record is abundantly clear and plain - Mr. McKenzie actually requested the jury to decide the offense elements, *i.e.,* drug type and quantities, but such request for a special jury verdict was denied by the trial judge; a decision affirmed by the Seventh Circuit. *McKenzie,* 922 F.2d at 1327-28. In light of the new rule of constitutional law established in *Apprendi,* Mr. McKenzie was sentenced illegally and unlawfully and beyond the statutory maximum of 20 years. However, he has no means or avenue to have his *Apprendi* claims judicially reviewed, other than through the presentment of the instant habeas petition before this Court.

It is reasonable to conclude that serious constitutional questions arise if a person who can prove his *Apprendi* claims had no access to judicial review. *See Triestman v. United States,* 124 F.3d 361, 363 (2nd Cir. 1997)("serious constitutional questions arise if a person who can prove his actual innocence . . ., had no access to judicial review."); *see also Herrera v. Collins,* 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *see also Murray v. Carrier,* 447 U.S. 478, 106 S.Ct. 2639 (1986);

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995); *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298 (1974); *Bousley v. United States,* 523 U.S. 614 (1998).

Mr. McKenzie's *Apprendi* claims "presents exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis v. United States,* 17 U.S. 333, 346, 94 S.Ct. 2198 (1974).

In sum, this Court should grant the instant habeas petition since Mr. McKenzie is precluded, as the circuit law now stands in the district of his conviction and imprisonment, (the Seventh and Eleventh Circuits), from having his illegally obtained conviction and imposed sentence vacated. Such circumstances, in light of the Court's new rule of constitutional law in *Apprendi,* warrant the Court to exercise its discretionary powers and grant the instant habeas corpus petition.

APPRENDI SHOULD BE APPLIED RETROACTIVELY TO HABEAS ACTIONS.

The applicability of *Apprendi* to drug cases raises the question of whether the Court must retroactively apply the new rule of constitutional law to Mr. McKenzie's case.

In *Sustache-Rivera v. United States*, 221 F. 3d 8, 2000 WL 101 5879 (1st Cir. 2000), the defendant sought leave from the court to file a second, successive 2255 motion to raise the *Jones-Apprendi* issue with reference to a 1993 carjacking conviction. The court refused to permit the filing of the motion because the claim did not satisfy the statutory requirements for the filing of a second or successive motion, in that it did not involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255; *see Sustache-Rivera*, 221 F.3d at ____, 2000 WL 1015879, at *5.

The Eleventh Circuit, in a drug case, *In Re Joshua*, ___F.3d___, 2000 WL 1227966 (11th Cir. Aug.30, 2000), agreed with the *Sustache-Rivera* conclusion that the Court has not declared *Apprendi* to be retroactive to cases on collateral review, *id.*, 2000 WL 1015879, at *2, and for the same reason advanced by the First Circuit in *Sustache-Rivera*, denied the petitioner's request to file a second or successive motion under section 2255. *See United States v. Talbott*, ____F.3d____, 2000 WL 1268166 (7th Cir. Sept.

7, 2000); *Hernandez v. United States*, ____F.3d____, 2000 WL 1253528 (7th Cir. Sept. 1, 2000).

The Third Circuit, on the other hand, disagreed with the decisions of the First, Seventh and Eleventh Circuit. In *West v. Vaughn*, 204 F.3d 53, 59-63 (3rd Cir. 2000), the court held that a decision of the Court is retroactive under the approach of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

The reasoning of the Third Circuit, on distinguishable facts, (*i.e.*, not involving a second or subsequent 2255 petition), was taken by Senior U.S. District Judge David S. Doty in *United States v. Murphy*, __ F.Supp. __, 2000 WL 1140782 (D. Minn. Aug. 7, 2000), which presents facts similar to the instant case. In *Murphy*, the defendant alleged:

> the Government violated his Fifth and Sixth amendment rights by using drug type and quantity to increase his statutory maximum penalty even though the jury made no specific finding as to the type or quantity of drug involved in the conspiracies.

Id., 2000 WL 1140782, at *2

Judge Doty noted that in *Apprendi*, the Court reexamined its prior decisions in this area and confirmed as a rule the principle first expressed in *Jones*: 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.' *Apprendi*, 120 S.Ct. at 2362-63." *Murphy*, 2000 WL 1140782, at *3. Judge Doty then noted that in *Aguayo-Delgado*, 2000 WL 988128, the Eighth Circuit made it clear this principle is a "rule of constitutional law." *Murphy*, 2000 WL 1140782, at *3.

Judge Doty then turned to the question of whether the court should apply *Apprendi* retroactively to section 2255 petitioners. Citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the court explained:

> [A] new rule is not to be applied retroactively on collateral review unless the rule falls within one of two narrow exceptions: (1) the new rule places certain kinds of primary conduct beyond the power of the criminal

> lawmaking authority to proscribe, or (2) the rule requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'"

Murphy, 2000 WL 1140782, at *3.

The court concluded the first exception was inapplicable to its analysis, but explained:

> [T]he *Apprendi* decision does implicate the second exception, which applies to those "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding" and "without which the likelihood of an accurate conviction is seriously diminished." *Sawyer v. Smith*, 497 U.S. 227, 242-244, [110 S.Ct. 2822, 2831-32, 111 L.Ed.2d 193] (1990)(*quoting Teague*, 489 U.S. at 311, 315); *see also Bousley v. United States*, 523 U.S. 614, 620, [116 S.Ct. 1604, 1610, 140 L.Ed.2d 828](1998)("The *Teague* doctrine is founded on the notion that

> one of the 'principal functions of habeas corpus [is]' "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." ' "

Id.

> The *Murphy* court further observed:
>
> There can be little doubt that the sweeping new requirement announced by the Court in *Apprendi* is so grounded in fundamental fairness that it may be considered of watershed importance. Accordingly, the court concludes that the *Apprendi* decision falls under the second exception to the *Teague* nonretroactivity principle and must be applied to this § 2255 motion. [FN3]

Murphy, 2000 WL 1140782, at *5 (the footnote is quoted below). Thus, the court vacated the defendant's 300-month sentence, and resentenced the defendant under the provisions of 21 U.S.C. § 841 (b)(1)(C) to a term of imprisonment of 240 months.

In a footnote to the finding quoted above, Judge Doty observed:

> The court is mindful of the potential impact of the conclusion that *Apprendi* is applicable retroactively. As Justice O'Connor asserts in her dissenting opinion, *Apprendi* "threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today." 120 S.Ct. at 2394-95 (0'Conner, J., dissenting).

Murphy, 2000 WL 1140782, at *6 n.13. This Court should agree with the *Murphy* court's conclusion as to the "watershed importance" of *Apprendi*, and its exception to the *Teague* nonretroactivity principle. However, this Court should also find that *Apprendi* falls under the first *Teague* exception, which the *Murphy* court found to be inapplicable, as discussed below.

Interpreting *Teague*, the Court has held, "Subject to two narrow exceptions, a case that is decided after a defendant's conviction and sentence become final may not

provide the basis for federal habeas relief if it announces a 'new rule.'" *Gilmore v. Taylor*, 508 U.S. 333, 339-40, 113 S.Ct. 2112, 2116, 124 L.Ed. 2d 306, 316 (1993) *(citing O'Dell v. Netherland*, 521 U.S. 151, 156-57, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997)).

The Court has addressed the question of finality of a conviction in the context of retroactivity. The Court defined a conviction as being final when "a judgment of conviction as been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S.Ct. 708, 712 n.6, 93 L.Ed.2d 649 (1987)(*citing United States v. Johnson*, 457 U.S. 537, 542 n.8, 102 S.Ct. 2579, 2582 n.8, 73 L.Ed.2d 202 (1982)). There is no question Mr. McKenzie's conviction is "final" for this purpose.

The next step in the *Teague* analysis is whether the rule the petitioner is seeking to benefit from is a new rule. A holding constitutes a 'new rule' under *Teague* if "it 'breaks new ground,'" 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by

precedent existing at the time the defendant's conviction became final.'" *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 897-98, 122 L.Ed.2d 260 (1993)(quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070)(emphasis in original). The relief Mr. McKenzie's seeks clearly was not "dictated by precedent existing at the time" his conviction became final. Thus, the rule is new, leading to consideration of the two *Teague* exceptions.

Having urged the Court to adopt the *Murphy* analysis of the second exception, Mr. McKenzie turns briefly to the "first, limited exception [which] is for new rules 'forbidding criminal punishment of certain primary conduct' [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *O'Dell*, 521 U.S. at 157, 117 S.Ct. at 1973)(*quoting Perry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 2953, 106 L.Ed.2d 265 (1989)). The exception itself contains two parts, the first of which - - 'forbidding criminal punishment of certain primary conduct' - - is not applicable to the *Apprendi* analysis. The second portion, however - - "prohibiting a certain category of punishment for a class of defendants

because of their status or offense" - - applies, at least arguably, to the new rule established by *Apprendi*.

This second part of the first *Teague* exception applies to the new rules which "address[] a 'substantive categorical guarante[e] accorded by the Constitution[,]'" *Graham v. Collins*, 506 U.S. 461, 477, 113 S.Ct. 892, 903, 122 L.Ed.2d 260 (1993) (*quoting Saffe v. Parks*, 494 U.S. 484, 494, 110 S.Ct. 1257, 1263, 108 L.Ed.2d 415 (1990)). *Apprendi* addresses such a constitutional guarantee. *See Apprendi*, 120 S.Ct. at 2360 ("a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater additional punishment' . . . may raise serious constitutional concern" (citations omitted)). In essence, *Apprendi* prohibits a certain category of punishment for a class of defendants because of their offense, to-wit: it prohibits the imposition of enhanced sentences in cases in which the Government has failed to prove drug quantity beyond a reasonable doubt. Although no federal circuit has considered the issue in this context, Mr. McKenzie respectfully submits that the Court should hold also that the first *Teague* exception applies to allow retroactive

application of *Apprendi* to section 2255 petitions as well as the habeas petition before the Court here.

MCKENZIE'S CONVICTION MUST BE VACATED AS THE DRUG STATUTES UNDER WHICH HE WAS CONVICTED ARE UNCONSTITUTIONAL AS A RESULT OF *APPRENDI V. NEW JERSEY,* 120 S.Ct. 2348, (2000).

A. BACKGROUND.

21 U.S.C. § 841 was enacted in 1970.[1] Since its inception, it ***has had the same basic structure. Subsection (a) of the statute*** sets forth "[u]nlawful acts," which require that the proscribed conducts with controlled substances be done "knowingly or intentionally." 21 U.S.C. § 841(a). The proscribed conduct under section 841(a) is knowingly or intentionally possessing a controlled substance with the intent to distribute.

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[1] Petitioner submits that this argument applies in equal force to 21 U.S.C. §§§§ 846, 952, 960 and 963, and the Court should conclude as such.

Subsection (b) of the statute sets forth various maximum and mandatory minimum penalties based on the existence of a variety of factors, including the type and quantity of drug "involv[ed]." See 21 U.S.C. § 841(b). Since the statute's inception, subsection (b) has been amended on numerous occasions. In 1970, the maximum sentence that an individual without a prior drug conviction could receive under the statutes was 15 years. See 21 U.S.C. § 841(b) (1970). As part of the "War on Drugs" beginning in the 1980s, however, amendments to the statute began to increase the maximum penalties. Most relevant to this particular case, 1986 amendments to section 841 made offenses "involving" large quantities of cocaine punishable by a mandatory minimum sentence of ten years and a maximum sentence of life imprisonment. See 21 U.S.C. §841(b) (1) (A) (ii) (II). Coincidentally, earlier the same year, the Court had held that factors that establish a mandatory minimum sentence (as opposed to a statutory maximum sentence) do not have to be proven to a jury beyond a reasonable doubt as elements of the offense. *See*

McMillan v. Pennsylvania, 477 U.S. 79 (1986). As a result of *McMillan,* the term "sentencing factor" was coined.

Eventually, every federal court of appeals, including the Seventh Circuit, *see, e.g., United States v. Savage,* 891 F.2d 145, 146-47 (7th Cir. 1989), adopted the position that section 841(b) was a sentencing factor. Congress continued to amend section 841, doing so in 1988, 1990, 1994, 1996, and 1998. Although modifying the statutes on numerous occasions, Congress never attempted to alter the unanimous view of the courts that section 841(b) was only a sentencing factor. In other words, it appeared as if the courts' interpretation was correct.

Application of the statutes proceeded accordingly until the Court decided *Jones v. United* States, 526 U.S. 227 (1999). In what, in criminal law circles, became famous dicta, the Court included the following language in a footnote: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be

charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones,* 526 U.S. at 243 n.6.

On June 26, 2000, the Court decided *Apprendi v. New Jersey,* 120 5. Ct. 2348, 2000 WL 807189 (June 26, 2000), in which it made the dicta in *Jones* a holding. *Id.* at *13 ("In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in Jones... 'It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'") (citation omitted). Perhaps more succinctly, *Apprendi* establishes that "the right to trial by jury . . . guarantee [s] - what it has been assumed to guarantee throughout our history - the right to have a jury determine those facts that determine the maximum sentence the law allows." *Id.* at *17 (Scalia, J. concurring). That *Apprendi* was intended to have a far-reaching impact is unmistakable, as indicated by Justice O'Connor's dissenting opinion, which states that the majority's decision "will surely be

remembered as a watershed change in constitutional law." *Id.* at *31 (O'Connor, J. dissenting).

Three days later, the Court vacated the Tenth Circuit's decision in *United States v. (Carless) Jones,* 194 F.3d 1178 (10th Cir. 1999), vacated, U.S. , No. 99-8176, 2000 WL 217939 (June 29, 2000) ("*Jones II*"), a case in which that court reaffirmed its prior holdings that section 841(b) was a sentencing factor and that the statute was nonetheless constitutional, and remanded for further consideration in light of *Apprendi.* This Court must now address what *Apprendi* and *Jones II* suggest - "that there is serious uncertainty about the constitutionality of... statutes [such as section 841]." *Apprendi,* 2000 WL 807189, at *54 (Breyer, J. dissenting).

B. SECTION 841 IS UNCONSTITUTIONAL.

There can be little doubt that if, as the Seventh Circuit and every other circuit has determined, section 841(b) is only a sentencing factor and not an element of the offense, it is unconstitutional under *Apprendi.* That is because, under 841(b), "a jury [does not] determine those facts that determine the maximum sentence the law allows."

Id. at *17 (Scalia, J. concurring) . Given this rather clear conclusion, there are only two ways to save the constitutionality of the statute. The first way is to apply the traditional doctrine of severability to excise the unconstitutional portions of the statutes and to retain those that can survive. The second way is to engage in a medal-winning performance of legal gymnastics and now hold that section 841(b) is really an element of the offense, not a sentencing factor. Neither method, however, works in this instance, and therefore this Court should deem the statute unconstitutional and reverse McKenzie's conviction for conspiring to violate it.

Moreover, this Court cannot attempt to uphold the statutes under the doctrine of severability by attempting to guess what penalties Congress would have imposed if it had known that section 841(b) was unconstitutional. Indeed, even if this Court thinks that it has a good idea of what Congress may have had in mind when it passed the defective legislation, it cannot invent such anticipated penalties. The Court's decision in *United States v. Evans,*

333 U.S. 483, 486 (1948), a case presenting issues quite similar to the instant one, makes this clear.

In *Evans,* the Court considered a statute that prohibited smuggling and harboring aliens and provided that violators of the law "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in or attempted to be landed or brought in." *Id.* at 484. Thus, the plain language of the statute assigned maximum penalties for aliens smuggled into the United States but did not assign maximum penalties for aliens harbored in the United States. The defendant in that case was charged with harboring, not smuggling, and the district court granted his motion to dismiss the indictment because the statute did not provide maximum penalties for his offense. *Id.* The Court unanimously affirmed.

If the Court could not rewrite the relatively simple statute in *Evans*, this Court should not take the step of severing out the unconstitutional provisions in section

841(b) and then rewriting the statute as a whole with invented penalties. As demonstrated by section 841(b), the sentencing considerations in drug cases are extremely complicated and are best left for Congress. In short, section 841(b) cannot be severed out, as the remaining portion of the statute is inoperative. As a result, the statute as a whole must be declared unconstitutional, and McKenzie's conviction should be reversed.

CONCLUSION

It should be axiomatic that Mr. McKenzie's federal sentence is illegal and unlawful in light of the Court's decision in *Apprendi*. The new rule of constitutional law further extends to Mr. McKenzie's conviction requiring vacatur as well. He received a sentence in excess of the statutory maximum, 20-years, as a result of the Government's failure to charge the drug quantity and role of offense in the indictment as well as allow the jury to decide such crucial elements of the offense at trial beyond a reasonable doubt. Mr. McKenzie requests the Court to grant the instant petition and other relief the Court deems proper and just.

November 15, 2000 Respectfully submitted,

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APPENDIX

UNITED STATE COURT OF APPEALS
For the Seventh Circuit
Chicago Illinois 60605

Submitted August 25, 2000
Decided September 11, 2000

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 00-3195

PATRICK MCKENZIE,
Petitioner,

On Motion for an Order Authorizing the District Court to Entertain a Second or Successive Motion for Collateral Review

UNITED STATES OF AMERICA,
Respondent.

ORDER

Patrick McKenzie has applied for an order pursuant to 28 U.S.C. § 2244(b)(3) authorizing the district court to consider a second or successive motion under 28 U.S.C. § 2255. In his application, McKenzie proposes to challenge his sentence as unconstitutional under the Supreme Court's recent decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348

(2000). To merit a successive motion, McKenzie must show that his claim is based on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *See* 28 U.S.C. § 2255 ¶ 8(2). The Supreme Court, however, has not specifically declared *Apprendi* retroactive to cases on collateral review. *See Bennett v. United States*, 119 F.3d 470, 471 (7th Cir. 1997)("only when a decision has been specifically declared retroactive by the Supreme Court may it be used as the basis for a successive motion"). Accordingly, we dismiss McKenzie's application without prejudice to renewal if the Supreme Court declares *Apprendi* retroactive. *See Hernandez v. United States,* No. 00-3048, slip. Op. At 3 (7th Ci. Sept. 1, 2000).

TITLE 28 U.S.C. § 2241

Section 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof;

* * * * * * * *

TITLE 28 U.S.C. § 2255

Section 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * * * * * *

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain -

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

U.S. CONSTITUTION: FIFTH AMENDMENT

Fifth Amendment - Rights of Persons

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; . . .

U.S. CONSTITUTION: SIXTH AMENDMENT

Sixth Amendment - Rights of Accused in Criminal Prosecutions

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.